MOTION FILED
JUN 1 1981

No. 80-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON BEHALF OF THE NATIONAL ASSOCIATION OF EVANGELICALS

AND

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF EVANGELICALS

JOHN W. WHITEHEAD
P. O. Box 409
Manassas, Virginia 22110
(703) 791-5179

J. ROBERT BRAME
801 East Main Street
Richmond, Virginia 23212
(804) 644-4131

JAMES J. KNICELY
707 East Main Street
Richmond, Virginia 23212
(804) 788-8605

Attorneys for Amicus Curiae
National Association of Evangelicals
450 East Gunderson Drive
Wheaton, Illinois 60187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-689

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON BEHALF OF THE NATIONAL ASSOCIATION OF EVANGELICALS

The National Association of Evangelicals (NAE), pursuant to Supreme Court Rule 36.3, hereby moves for leave to file a brief as *amicus curiae* in support of the respondents in this case and for affirmation of the decision of the United States Court of Appeals for the Eighth Circuit. The respondents have consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The motion is necessitated by petitioners' refusal to consent to the filing of the appended brief.

NAE is a major national interest group of evangelical Christians dedicated to strengthening the ministry of the local church. Its members include state and local evangelical

organizations, colleges and universities and some 36,000 churches from 74 national denominations (with a constituency of approximately 3.5 million people). NAE has a number of affiliates with a service constituency in excess of 10 million persons worldwide.

NAE's affiliates include the National Religious Broadcasters, the World Relief Corporation, an organization that administers to the needy and the poor of the world, and the Evangelical Foreign Mission Association, whose members include such campus-related groups as Campus Crusade for Christ, International, the Navigators, and Youth for Christ, International. In addition, NAE has established regular liaison with other evangelical youth and campus-related groups and associations, including Inter-Varsity Christian Fellowship, Young Life, Teen Challenge, and International Students, Inc. Most of these groups have locally-affiliated student members meeting on hundreds of public and private college and university campuses across the Nation and will be directly affected by the decision of the Court in this case.

NAE has represented its members' interest in matters before the courts, the United States Congress, and the Executive Branch. This representation constitutes a significant aspect of NAE's activities in matters where governmental action directly affects the ministry and mission of the local church and NAE's affiliates, related groups and individual members.

The issues presented in this case concern the rights of individuals to express their religious ideas on the public university campuses of our Nation. These rights have been exercised by students since the founding of our Nation. Thomas Jefferson and James Madison, the Framers of the First Amendment, in their official capacities as Rector and Member of the Board of Visitors, respectively, of the University of Virginia, expressly approved the rights of students

to meet for religious worship and teaching at the public University of Virginia. The decision of the District Court in this case to prohibit such meetings, if sustained, will result in an unparalleled denial of individual freedom in this country. This matter is of direct importance to the activities of members of NAE affiliates and related groups whose student members have heretofore been permitted to use public university facilities for self-directed, voluntary religious meetings on the same basis as other campus student groups.

It is the position of NAE that the decision of the Court of Appeals was correct in finding that the students' rights of Free Speech and Free Exercise were denied by the District Court's ruling and that the State's action constituted a violation of the Establishment Clause. In this regard, NAE wishes to bring to this Court's attention certain historical information concerning the views of Thomas Jefferson and James Madison with regard to the Establishment Clause and its application to student religious meetings on public university campuses. In addition, NAE wishes to comment on the District Court's holding that a neutral "open forum" policy at the university would constitute an Establishment of Religion. Finally, NAE wishes to express its views concerning the Court of Appeals' ruling that the State's action reflected hostility to religion and thereby violated the Establishment Clause. This latter holding is particularly noteworthy in view of the underlying purposes of the Establishment Clause and the manner in which public officials, unfamiliar with the law as interpreted by this Court, are using the Establishment Clause as a weapon formed against religious exercise in this country. The perspective of NAE and its affiliates on these particular issues goes beyond that of respondents in this respect.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of NAE for leave

to file this brief as *amicus curiae* in support of respondents be granted.

Respectfully submitted,

JOHN W. WHITEHEAD
JAMES J. KNICELY
J. ROBERT BRAME

Attorneys for Amicus Curiae
National Association of Evangelicals
450 E. Gunderson Drive
Wheaton, Illinois 60187

Dated: May 27, 1981

QUESTIONS PRESENTED

Regulation 4.0314.0107 of the public university system of the State of Missouri, which prohibits the use of university facilities and grounds by recognized campus organizations for purposes of religious worship and teaching, violates the rights of respondent students under the First and Fourteenth Amendments of the United States Constitution in that:

(i) the historical evidence indicates that the Framers never intended for the Establishment Clause to be applied to the fact situation found in the present case;

(ii) the Regulation is a law respecting the establishment of religion prohibited under the Establishment Clause;

(iii) the Regulation abridges the respondents' rights to Free Speech, Free Association and Free Exercise of Religion and denies respondents' rights to Equal Protection of the Law.

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Statement of Facts 3

The Question to Which This Brief is Addressed 4

Summary of Argument 4

Argument

I. The District Court's Decision That Voluntary Student Religious Meetings On Campus Violated The Establishment Clause Was In Direct Conflict With The Intentions Of The Framers Of The United States Constitution As Expressed In The First Amendment. 5
A. The Historical Background Of The First Amendment. 5
B. The Views Of Thomas Jefferson And James Madison. 8

II. The District Court Erred In Holding That The State Regulation Was Needed To Avoid An Establishment of Religion. 14

III. The Court Of Appeals Was Correct In Holding That The State's Regulation Violates The Establishment Clause. 20
A. The Primary Purpose And Effect Of The Regulation Is To Inhibit Religion. 22
B. The Regulation Will Cause Excessive Entanglement With The State In Regulating And Monitoring Religious Expression. 25

Conclusion 26

TABLE OF CASES

Cases

Page

Brandon v. *Board of Education*, 645 F.2d 971 (2nd Cir. 1980) 21
Chess v. *Widmar*, 480 F.Supp. 907 (W.D. Mo. 1979) 23, 24
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973) 11
Dittman v. *Western Washington University*, No. C79-1189V (W.D. Wash. Feb. 27, 1980) appeal docketed No. 80-3120 (9th Cir. April 7, 1980) 21
Engel v. *Vitale*, 370 U.S. 421 (1962) 16
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 16
Everson v. *Board of Education*, 330 U.S. 1 (1947) 8, 23
Florey v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 49 U.S.L.W. 3351 (November 10, 1980) .. 21
Illinois Ex. Rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948) 14, 16
Johnson v. *Huntington Beach Union High School, District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Ct. App. 1977), *cert. den.* 434 U.S. 877 (1977) 21
Keegan v. *University of Delaware*, 349 A.2d 14 (Del. 1975) .. 21
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 11, 15, 26
Malnak v. *Yogi*, 440 F.Supp. 1284 (D.N.J. 1977) *aff'd* 592 F.2d 197 (3rd Cir. 1979) 25
McDaniel v. *Paty*, 435 U.S. 618 (1978) 22, 23
N.L.R.B. v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) .. 25
Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 15
School District of Abingdon Township v. *Schempp*, 374 U.S. 203 (1963) 15, 16, 20, 22, 27
Stacy v. *Williams*, 306 F.Supp. 963 (D. Miss. 1969), *aff'd*, 446 F.2d 1366 (5th Cir. 1971) 21
Surinach v. *Pesquera de Busqueto*, 604 F.2d 73 (1st Cir. 1979) 21, 25
Tilton v. *Richardson*, 403 U.S. 672 (1970) 15
Tinker v. *Des Moines Independent School District*, 393 U.S. 503 (1969) 28
Torasco v. *Watkins*, 367 U.S. 488 (1961) 24
Truax v. *Corrigan*, 257 U.S. 312 (1921) 10
Zorach v. *Clauson*, 343 U.S. 306 (1952) 7, 16, 18, 23, 24

Other Sources

Page

Arons, *The Separation of School and State: Pierce Reconsidered,* 46 Harv. Educ. Rev. 75 (1976) 24
H. Berman, *The Interaction of Law and Religion* (1973) 19
Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation,* 2 Harv. J. Law & Pub. Pol'y 125 (1979) 9
Clark, *The Church and the State—Its History and Relationship,* from Religion and the Public School (Wartburg College, Waverly Forum, 1964) 27
Comment, *Constitutional Law—Religious Exercises and the Public Schools,* 20 Ark. L. Rev. 320 (1967) 27
T. Cooley, *Principles of Constitutional Law* (1890) 7
Corwin, *The Supreme Court As National School Board,* 14 Law and Contemp. Prob. 3 (1949) 8, 10
Documents Illustrative of the Formation of the Union of American States (1927) 6
Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73 (1949) 5, 6, 9, 10
Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 81 Harv. L. Rev. 513 (1968) 24
Horn, *Taking God to Court,* Christianity Today 24 (January 2, 1981) 21
Konvitz, *Separation of Church and State: The First Freedom,* 14 Law & Contemp. Prob. 44 (1949) 11
Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment,* 2 Washburn L.J. 65 (1962) 10
Meiklejohn, *Educational Cooperation Between Church and State,* 14 Law & Contemp. Prob. 61 (1949) 10, 19
Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1056 (1978) 10
Regulations of the University (Oct. 4, 1824) Ch. II, Section 1.. 13
Schwarz, *No Imposition of Religion, The Establishment Clause Value,* 77 Yale L.J. 692 (1968) 10
J. Story, 2 *Commentaries on the Constitution of the United States* (2d ed. 1951) 593-95 7

Page

Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1306 (1949) 6

19 *The Writings of Thomas Jefferson* (Memorial ed. 1904) ..9, 13

Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L. J. 3 (1978) 27

A. N. Whitehead, The Aims of Education (1952) 24

Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 Tex. Tech. L. Rev. 1 (1978) 7

J. O. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society (1897) 14

Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L. Rev. 350 (1980) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-689

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF EVANGELICALS

INTEREST OF AMICUS CURIAE[1]

The National Association of Evangelicals (hereinafter "NAE"), located in Wheaton, Illinois, is a non-profit religious corporation and association of state and local evangelical organizations, colleges and universities and some 36,000 churches from 74 national denominations (with a constituency of approximately 3.5 million people) dedicated to strengthening the ministry of the local church.

[1] The respondents have consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The petitioners have withheld consent to the filing of this brief and that action is the subject of a Motion for Leave to File, timely presented, in accordance with Rule 42 of the Rules of the Supreme Court.

NAE has a number of affiliates with a service constituency in excess of 10 million persons worldwide. These affiliates include the National Religious Broadcasters, the World Relief Corporation, an organization that administered in excess of 14 million dollars of aid to the needy and the poor of the world in 1980, and the Evangelical Foreign Mission Association, whose members include such campus-related groups as Campus Crusade for Christ, International, the Navigators, and Youth for Christ, International. In addition, NAE has established regular liaison with other evangelical youth and campus-related groups and associations, including Inter-Varsity Christian Fellowship, Young Life, Teen Challenge, and International Students, Inc. Most of these groups have locally-affiliated student members meeting on hundreds of public and private college and university campuses across the Nation and will be directly affected by the decision of the Court in this case.

The State of Missouri acting through officials of its State University has unlawfully interfered with individual freedoms which have existed in this country for over 200 years. NAE is deeply concerned about the serious consequences that will flow from the Court's decision. At stake are precious liberties underlying the founding of our Nation. The essence of the freedom of those who profess religious beliefs and wish to express and exercise those beliefs as guaranteed by the First Amendment is threatened in a frightening way in this case.

Counsel for NAE have specialized in constitutional litigation, including the Religion Clauses of the First Amendment. Counsel John W. Whitehead has participated in numerous cases involving the Religion Clauses, serving as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored several books and law review articles that

focus on the interpretation and application of the First Amendment Religion Clauses. NAE believes the combined expertise of its Counsel will be of assistance to the Court. Therefore, this brief is filed to provide the Court with the view of *amicus curiae* on certain legal and historical aspects of this case which to date have not been adequately addressed by the parties.

STATEMENT OF FACTS

NAE adopts by reference the Statement of Facts as set forth in respondents' brief filed with this Court. NAE, however, emphasizes that this is not a situation where non-students are attempting to invade a university campus and force their views upon others. Instead, this case factually concerns the attempt by a group of tuition-paying students at the University of Missouri-Kansas City to meet and associate concerning the religious views they hold in common, and the efforts of the State to stop such meetings.

The respondent-students seek to enjoin the enforcement of the State University's Regulation No. 4.0314.0107 (the "Regulation") which prohibits the voluntary, extracurricular use of campus buildings for student religious meetings. The Regulation specifically bans the use of University facilities by student or non-student groups for religious worship or teaching. The policy extends to all University grounds, including the University lawn, with the only exception being University chapels (of which there are none at its Kansas City campus), provided that such use is only on an iregular basis. Respondent-students are members of an officially recognized student group and seek to exchange ideas, religious or otherwise, on the basis of the same privileges granted to other student groups at the University. The

State, however, has denied these rights, curtailing priceless First and Fourteenth Amendment guarantees.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed solely to the historical background of the Establishment Clause issues raised in this case and whether the State's prohibition against the religious practices in question in fact constitutes a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the Framers had a different understanding of the degree to which State action constituted "a law respecting the Establishment of religion" from that advanced in the early decisions of this Court reflecting on the Establishment Clause. First, it is clear that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious belief and expression, provided there was no active state sponsorship of any particular religion sect or practice. Moreover, there is important evidence indicating that Thomas Jefferson and James Madison specifically approved of regular religious meetings for worship and teaching by students on public university campuses. This experience of the Framers from Virginia cannot be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedim. The record is clear that the Framers would not have sanctioned the State Regulation in question here.

In addition to this historical evidence, it is evident that the State Regulation is hostile to religion and favors nonreligion over religion. In this respect, the Regulation is violative of the Establishment Clause. It serves no valid secular purpose. Its primary effect is to inhibit and interfere with religious thought and expression. By closing the campus to voluntary student religious meetings, ostensibly for meritorious reasons, the State has disparaged religion and placed its adherents at a very real and distinct disadvantage, both in the individual expression of their religious views and beliefs and as a group in relation to proponents of nonreligious thought and expression. Finally, the Regulation poses the very serious threat of excessive entanglement by State intervention in regulating and monitoring religious thought and expression, As the Court of Appeals correctly recognized, this hostile State policy must not be permitted to stand.

I.

The District Court's Decision That Voluntary Student Religious Meetings On Campus Violated The Establishment Clause Was In Direct Conflict With The Intentions Of The Framers Of The United States Constitution As Expressed In The First Amendment.

A. The Historical Background Of The First Amendment.

From this country's inception, the state and its educational institutions have encouraged and accommodated the practice of religion. From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that "[t]he climate of the American revolutionary period, including the period of constitutional devel-

opment, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The promotion of religious expression and freedom was of paramount concern to the Framers of the Constitution and, as they saw it, to the health of the Nation. This concern was clearly expressed in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ord. of 1787, Jul. 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

The focus of the revolutionary period was not the eradication of religion from the public schools or public life. Instead, it was to ensure that religious exercise be accommodated. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion. . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so

> far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries of the United States* (2d ed., 1851) 593-95.[2] The Framers of the First Amendment therefore, never intended a complete separation of church and state. Interestingly, that has never occurred. If the intentions of the Framers are ignored, then, as Justice Douglas predicted:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so held me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. *Clauson*, 343 U.S. 306, 312-13 (1952). The same might be said of the higher law of the Ten Commandments etched in marble in the Chamber of this Court directly above the seat of the Chief Justice. The predominantly religious orientation and history of the American people mitigates against such hostility toward religion. Any

[2] Justice Story's construction has been corroborated by others. T. Cooley, *Principles of Constitutional Law* 224 (1893); Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 Tex. Tech L. Rev. 1, 2-5 (1978).

rule of separation that the Framers had in mind when they drafted the First Amendment was adopted in a climate of accommodation and benevolence, not of hostility toward religion.

Of course, this is not to suggest that there was no concern that the State not sponsor, compel or actively participate in religious activity. This too was of concern, especially in states where there was no established State Church. In the words of James Madison, the First Amendment Religion Clauses were prompted because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Prob. 3, 11 (1949). The fear of the Framers was that the State would promulgate a statist ideology and force it upon its citizens. To say this, however, is not to say that the Framers would have been apprehensive concerning the desire of a group of university students to meet and exchange their religious views. The Framers never envisioned, as will be seen in this brief, the situation in the present case where the Constitution would ever be used to deny the very freedoms they sought to establish.

B. The View Of Thomas Jefferson And James Madison.

In its early decisions interpreting the Establishment Clause, this Court turned for guidance to the experience of the Virginia Framers. As Justice Black stated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947):

> . . . Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the

> movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U.S. at 11. Justice Black relied heavily on James Madison's *Memorial and Remonstrance against Religious Assessments* and Thomas Jefferson's *Bill for Establishing Religious Freedom* as the basis for engrafting Jefferson's post-First Amendment "wall of separation" into Establishment Clause doctrine. Subsequent scholarship and this Court's more recent opinions, as will be seen below, have put that metaphor into a more balanced and accurate historical context.

It is doubtful that Madison intended the Establishment Clause to effect as complete a separation of church and state as the Court's opinion in the *Everson* case attributes to him. Madison's initial text for the First Amendment in the House of Representatives was worded " 'nor shall any national religion be established', and the first provision adopted in the Senate prohibited any 'law establishing articles of faith or a mode of worship. . . .' " Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 Harv. J. Law & Pub. Pol'y 125, 127-28 (1979). Madison's second version, reported from committee in the House of Representatives, read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." Fahy *supra*, at 79. Madison's understanding, according to the contemporaneous congressional journal, was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of

Congress 730-731 (1789-1791) *cited in* Corwin *supra*, at 11. In view of this record of Madison's participation in the drafting process, his 1785 statements contained in the *Memorial and Remonstrance*, though eloquent and even persuasive in context of a local political fight against levying a tax in support of religious instruction, do not fashion the Establishment Clause into the imposing barrier that a doctrinaire reading of Jefferson's metaphor would suggest.[3] A surprising number of scholars agree that Madison's views of separation of church and state expressed at the framing of the First Amendment were not as absolute as those portrayed in the early Religion Clause cases of this Court. *See* Corwin *supra*, at 10-16; Fahy *supra*, at 78-80; Meiklejohn, *Educational Cooperation Between Church and State*, 14 Law & Contempt. Prob. 61, 71 (1949); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L. J. 65 (1962); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L. J. 692, 708-709 (1968); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1057-1058 n. 11 (1978).

Jefferson was in Paris at the time the First Amendment was introduced and adopted. See Corwin *supra*, at 13. Although his ideas and writing may have influenced the climate for its adoption, there is, unlike for Madison, no direct evidence contemporaneous with the Congress that Jefferson's

---

[3] Professor Sutherland has pointed out the dangers of making a metaphor into a rule of law:

> The wall of separation is a very satisfying metaphor. It has a fine, tangible sound. No one can doubt what a stone wall is. [and then citing Holmes in footnote 15] "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . . Delusive exactness is a source of fallacy throughout the law." *Truax* v. *Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J. dissenting).
>
> Sutherland *supra*, at 1311.

views did in fact directly influence the debate or drafting of the text of the Religion Clauses. See, e.g., Konvitz, *Separation of Church and State: The First Freedom,* 14 Law & Contemp. Prob. 44, 57 (1949) (whose evidence attributing influence to Jefferson is from years prior to or after the Convention).

Rather than a high and impenetrable barrier, what emerges from study of the relevant utterances of Madison and Jefferson is opposition to active involvement of the State in sponsoring or compelling religious worship and practices or the direct imposition of financial levies in support thereof. Although Jefferson's metaphoric "wall of separation" may not have been "as 'winding as the famous serpentine wall he designed for the University of Virginia'",[4] it was in Jefferson's time, as much as now, a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman,* 403 U. S. 602, 614 (1971). That the wall of separation was indistinct and variable for Jefferson and Madison is clearly seen in their reaction to issues and facts similar to those presented in this case several years after the adoption of the Religion Clauses.

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school has been wholly governed, managed and controlled by the State of Virginia. The question of the constitutional limitations with respect to the teaching of religion at the University of Virginia, in particular Christianity, was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom

---

[4] *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 761 (1973).

James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further and great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and

> would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . ."

19 *The Writings of Thomas Jefferson* (Memorial ed., 1904) 414-17 (Emphasis supplied).[5] Simply put, Thomas Jefferson, in order to perpetuate and accomodate the religious beliefs and exercise of the students of the University of Virginia, recommended that students be allowed to meet on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Jefferson was not opposed to religious worship and study being conducted on the premises of the University of Virginia. To the contrary, he accepted it as being within constitutional parameters. Moreover, it is clear that the so-called "wall of separation between Church and State" that Mr. Jefferson built at the University of Virginia, which he founded, did not exclude religious education from that school. As Justice Reed once said:

> The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

---

[5] Jefferson's suggestions were adopted by the University of Virginia. The University's regulations drafted pursuant to Jefferson's views provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour. (Emphasis supplied) *Regulations of the University* (Oct. 4, 1824) Ch. II, Section 1.

Illinois Ex. Rel. McCollum v. *Board of Education*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

James Madison, who with Samuel Livermore was the principal drafter of the First Amendment, was a Member of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools. Moreover, it is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J. O. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id. at 5*. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9. If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, the freedom to associate voluntarily on the campus for religious purposes, as respondents seek to do, should not for the first time in our history be denied. To rule otherwise would not only distort the law but would run contrary to the wishes of the very men who drafted the document upon which we base our freedom.

II.

The District Court Erred In Holding That The State Regulation Was Needed To Avoid An Establishment Of Religion

The District Court found the State's prohibition of campus religious meetings to be constitutionally required to avoid an establishment of religion at the University. The

Court of Appeals reversed, holding that a "neutral" policy permitting students to use University facilities for self-directed activities did not constitute an establishment of religion. *Amicus curiae* submit that the reasoning of the Court of Appeals is constitutionally sound.

The District Court based its decision on the second strand of the tri-partite test fashioned in *Lemon* v. *Kurtzman*, 403 U.S. at 612-613. It held the principal or primary effect of permitting groups to meet for religious purposes, would be to advance religion, relying on *Tilton* v. *Richardson*, 403 U.S. 672 (1971), a case involving federal subsidies for the construction of facilities on sectarian campuses. The District Court's reasoning is defective for several reasons.

First, the *Tilton* case is inapposite. In *Tilton*, the Federal subsidy would have provided substantial state funding of facilities which could eventually be used solely and exclusively for religious purposes. The funding, in effect, constituted a substantial direct federal subsidy of religious institutions and activity. That is not the case here. There is no direct financial aid of any significance. Any financial benefit that does accrue from use of the University facilities is, as the Court of Appeals noted, minimal, especially since these students have paid an activities fee for the use of such facilities. This financial benefit is incidental, no more than that necessary for reasonable accomodation of religious expression. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976).

Second, and more importantly, *Tilton* involved no countervailing Free Exercise or Free Speech interest. As Justice Brennan noted in *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 247 (1963) (Concuring Opinion), "the logical interrelationship between the Establishment and the Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be with-

held in order to avoid infringement of rights of free exercise."

The law of the case at bar should have been drawn from the cases involving religious practices and exercise in the context of public education. *Illinois ex. rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), *Zorach* v. *Clauson*, 343 U.S. 306 (1952), *Engel* v. *Vitale*, 370 U.S. 421 (1962), *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203 (1963), and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).[6]

McCollum, *Engel*, *Schempp* and *Epperson* involved state required religious activities as part of the school curriculum. *Zorach* involved an accommodation by the public school in favoring the religious interests of the students, i.e. permitting them to receive religious instruction on a "released time" basis. This distinction between the cases is important for the case at bar.

In *McCollum*, *Engel* and *Schempp*, it appeared to the school children and faculty that the State stood behind the content of the doctrinal teaching or exercise. In each, the government was actively sponsoring religion and mandating that religious exercises be conducted on its premises. In each, the religious exercise or practice was an integral part of the school curriculum. In *Epperson*, the State imposed its will on the curriculum indirectly by criminal sanction.

By contrast, in *Zorach*, the activities were *not* curricular

---

[6] In *McCollum*, the Court forbade religious instruction in public school facilities on a "released time" basis. In *Zorach*, the Court permitted "released time" instruction off campus. In *Engel*, the Court outlawed a nondenominational prayer for public schools written by the Regents of the State of New York. In *Schempp*, the Court forbade state required Bible readings in public schools. And in *Epperson*, the Court invalidated the Arkansas anti-evolution statute.

in nature. They were *not* mandated or required by the State, but were rather voluntary. The State did not lend its backing or sponsorship to the activities. As Justice Douglas stated, each student was "left to his own desires as to the manner or time of his religious devotions, if any." 343 U.S. at 311. The force of the school system was not used to promote the religious instruction involved.

Admittedly, *Zorach* permitted off-campus religious activities, whereas *McCollum* forbade similar activities on-campus, but to entertain the notion that the geography of the activity is the only operative distinction is simplistic to the extreme and not supported by the case law. Justice Brennan plainly exposed the fallacy of this argument in his concurring opinion in *Schempp*. There, he explained that the real issue in *McCollum* was putting the religious instructor in the same position of authority as the secular teachers in the public school classroom, "lending to the support of sectarian instruction all the authority of the governmentally operated public school system." 374 U.S. at 263. He continued:

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

374 U.S. at 263. Writing in *Zorach*, Justice Douglas distinguished *McCollum* on these very grounds: "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." 343 U.S. at 315. Four Justices concurring in *McCollum* also affirmed the basis of that decision: "[t]he momentum of

the whole school atmosphere and school planning is presumably put behind religious instruction . . . precisely in order to secure for the religious instruction such momentum and planning." 333 U.S. at 230-231.

Thus, if the "prestige and capacity for influence," the "momentum of the whole school atmosphere," and "the force of the public school," are placed behind a religious exercise or practice, there is an establishment of religion by the sovereign. The mere use of school facilities and the geographic location of any particular religious exercise or practice may or may not be relevant among other factors in reaching a determination that the state has imposed or sponsored such a practice or exercise.

Viewed in the *McCollum* line of cases, an "open forum" policy would not violate the Establishment Clause. There is no state sponsorship. No religious exercise is even remotely sanctioned by the University. No student is required to attend or participate in the religious meetings. No student is required to practice a religious exercise. No student or taxpayer is forced to contribute any more for religion in the operation of the University than for any other campus activity, societal endeavor or similar accomodation of religion. The student meetings for worship and teaching are wholly voluntary and without violation of conscience in any respect.

Moreover, an "open forum" policy is unquestionably neutral. There is no favoritism. There is no "religious gerrymander." The State is not lending its prestige, power or influence to religious thought or expression. There is absolute neutrality between religion and religion, and religion and non-religion. Each group is permitted to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson,* 343 U.S. at 313. This is the proper balance between establishment and free exercise.

Finally, the purpose or primary effect of permitting student religious meetings at the University is *not* the advancement of religion. Rather, the purpose or primary effect of an open forum is the development of the social and cultural awareness, as well as the intellectual curiosity, of students attending the University, allowing for the presentation and debate of ideas from every sphere of thought. This purpose, in the context of the religious element of our culture, has been eloquently stated by Alexander Meiklejohn, the former President of Amherst College:

> [T]he values to be gained by religious teaching are not merely private. To say that is to rob religious attitudes of all objective "spiritual" meaning. It is to reduce their significance to that of private personal idiosyncrasies. As against such false sectarianism, surely the value of all our creeds, religious or non-religious, lies in their common, though varied, attempt so to interpret men and society and the world as to find, in those interpretations, bases for human behavior, for human association.

Meiklejohn *supra,* at 66-67. Clearly, religious thought, culture and association are values properly questioned and explored in any educational setting. To attempt to segregate such expression from the intercourse of ideas by a false, wooden concept derived from a figure of speech extended to the limits of its logic is intellectual death of the highest form.[7]

---

[7] Professor Harold J. Berman, Story Professor of Law at Harvard Law School lays the modern American malaise at the foot of undue separation of religion from public life: "Western man is undergoing an integrity crisis—the kind of crisis that many individual men and women experience in their early fifties when they ask themselves with utmost seriousness, and often in panic, what their lives have stood for and where they are headed. . . . Our whole culture seems to be facing the possibility of a kind of nervous breakdown." H. Berman, *The Interaction of Law and Religion* 21 (1974). He con-

III.

The Court Of Appeals Was Correct In Holding That The State's Regulation Violates The Establishment Clause.

The Court of Appeals found that the State Regulation violated the Establishment Clause because it had the primary effect of inhibiting religion, by singling out and stigmatizing religious groups. It also found that the State prohibition hopelessly entangled officials of the State in determining and monitoring whether a proposed event involved religious worship or teaching. Although this case represents one of the few reported cases where the Establishment Clause has in this manner vindicated individual free exercise rights, the approach taken by the Court of Appeals is constitutionally sound and fully in accord with the philosophy of the Establishment Clause and this Court's prior opinions. The State's use of the Establishment Clause "as a sword to justify repression of religion or its adherents from any aspect of public life,"[8] is constitutionally impermissible and must be recognized for what it is, "a law respecting the establishment of religion" the primary effect of which is to inhibit and regulate the free expression of religious belief.

"[T]here are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause." *School District of Abingdon Township* v. *Schempp*, 374 U.S. at 309 (Dissenting Opinion of Stewart, J.). The two Clauses overlap. The Establishment Clause protects free exercise by preventing preferral of one religious sect over another, or nonreligion over religion, or vice versa. The Free Exercise Clause, by preserving the in-

---

cludes that this breakdown is accentuated, if not caused, by the separation of the religious from the public and warns that if these "compartments" are not "opened up to each other, they will imprison and stifle us." *Id.* at 18.

[8] *McDaniel* v. *Paty* 435 U.S. 618, 641 (1978) (Concurring Opinion of Brennan, J.)

violability of conscience, protects individuals and groups against forced expression of other creeds and thought, and exalts the right of the believer (or non-believer) to believe and express beliefs without fear of reprisal by the State. It is thus not inconsistent with Constitutional doctrine for there to be, in some circumstances, dual protection under both Clauses, or tension between the Clauses or cross purposes within a Clause.

In this case, the Court should protect the respondents against the State of Missouri's attempt to inhibit religious expression. It is essential that this protection be afforded under the Establishment Clause to protect these students (and other religious groups in this country) from similar assaults by misguided officials who, having just enough knowledge to be dangerous, apply the pronouncements of this Court to the end of eradicating individual religious expression from public life, establishing Secularism or nonreligion under a regime of state control.[9] *See Dittman* v. *Western Washington University* No. C79-1189V (W.D. Wash., Feb. 27, 1980), appeal docketed No. 80-3120 (9th Cir., April 7, 1980); *Brandon* v. *Board of Education,* 645 F.2d 971 (2nd Cir. 1980), No. 80-1396, petition for certiorari filed February 17, 1981; *Florey* v. *Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980), *cert. den.,* 49 U.S. L.W. 3351 (November 10, 1980), *Surinach* v. *Pesquera de Busqueto* 604 F.2d 73 (1st Cir. 1979); *Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App.3d 1, 137 Cal. Rptr. 43 (Ct. App. 1977), *cert. den.,* 434 U.S. 877 (1977); *Keegan* v. *University of Delaware,* 349 A.2d 14 (Del. 1975); and *Stacy* v. *Williams,* 306 F.Supp. 963 (N.D. Miss. 1969), *aff'd* 446 F.2d 1366 (5th Cir. 1971). "The

[9] Attempts to suppress religious expression from public life are becoming more common. *See* Horn, *Taking God to Court,* 25 Christianity Today 24 (January 2, 1981).

Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Concurring Opinion of Brennan, J.).

A. The Primary Purpose And Effect Of The Regulation Is To Inhibit Religion

In *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 222 (1963), this Court stated:

> [The Court] has consistently held that the [Establishment C]lause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: What are the purpose and primary effect of the enactment. If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say to withstand the structures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

The State Regulation is plainly in violation of the Establishment Clause. It serves no valid secular purpose. Its purported purpose of nonestablishment, while laudable, proves too much. The actual purpose or effect of the regulation is to inhibit religion.

The Regulation specifically singles out religious worship and teaching as prohibited practices. Individual religious expression is thereby labeled as suspect. Meetings of students wishing to express religious beliefs are prohibited. This disparagement has resulted in a lessened visibility of religious groups on campus. It has caused the respondents great inconvenience, with no comparable meeting facility on or near the campus. Their group, once the largest on

campus, has lost over a third of its membership. Perhaps most troubling is the stipulated testimony of one of the students, Florian Frederick Chess, that the State's action has caused "our message and our purposes [to] seem more remote and less relevant to the typical student." *Chess* v. *Widmar*, 480 F.Supp. 907, 912 (W.D. Mo. 1979). In short, the State has suppressed religious expression at the University of Missouri at Kansas. This is shameful and a travesty on the liberties guaranteed by the United States Constitution. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 434 U.S. at 641 (Concurring Opinion of Brennan, J.).

"State power is no more to be used so as to handicap religions that it is to favor them." *Everson* v. *Board of Education*, 330 U.S. at 18. There is no "constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach* v. *Clauson*, 343 U.S. at 314. "We cannot read into the Bill of Rights such a philosophy of hostility to religion." *Id.* at 315.

Moreover, the exclusion of religion from the forum of ideas at the University of Missouri favors nonreligious thought and expression. Secularism is given a monopoly to flourish, religion is cut off and disparaged. In *Schempp*, 374 U.S. at 225, this Court stated:

> We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who

> do believe." *quoting Zorach* v. *Clauson*, 343 U.S. at 314.

The State's action here, however, amounts to a *de facto* establishment of Secularism. *See Gianella, Religious Liberty, Nonestablishment and Doctrinal Development*, 81 Harv. L. Rev. 513, 586-587 (1968); Bird *supra*, at 174-185 (and cases cited therein); and *Torasco* v. *Watkins*, 367 U.S. 488, 495 n. 11 (1961). As one recent observer has said, it is a

> legal fiction that schooling can be value-neutral. By its use of the secular-religious dichotomy the Court has been able to eliminate an obvious form of belief manipulation — religious observance — from public schools, but it has thereby implied that the secular content of schooling does not touch upon the basic beliefs and values of students. . . .

Arons, *The Separation of School and State: Pierce Reconsidered*, 46 Harv. Educ. Rev. 76, 97 (1976) *cited* in Bird *supra*, at 180.

Alfred North Whitehead has pointed out that all education is essentially religious. A. N. Whitehead, *The Aims of Education* 26 (1952). Education as contrasted with vocational training requires an examination and discussion of fundamental values and the determination of who one is. The University of Missouri has recognized the need for these discussions by encouraging student "self-directed activit[ies]" on campus to provide opportunities for "self-realization and individual growth." *Chess* v. *Widmar*, No. 80-1048 p. 2, n. 1 (8th Cir. August 4, 1980). Such inquiry is essentially religious in nature. The effect of the University's Regulation is to limit this inquiry to the humanist schools of experience, banning inquiry into those schools of human learning and experience which look for such answers in a supernatural framework. This policy places

the force of the State behind a particular line of thought and expression, and directly against the classic Judeo-Christian religious tradition and other schools of religious thought which interpret man's behavior and condition from a divine perspective. The establishment of non-religion at the University of Missouri should not be permitted to stand.

B. The Regulation Will Cause Excessive Entaglement With The State In Regulating And Monitoring Religious Expression

In addition to inhibiting religious expression, the State's action carries with it the danger of excessive entanglement. See *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501-504 (1979). The respondents here were required to submit information as to their activities and meetings. Abuses in this area could develop. See *Surinach* v. *Pesquera de Busqueto*, 604 F.2d 73 (1st Cir. 1979).

Although the respondents had clearly religious purposes that may not always be the case. Can State officials judge what is "religious" worship and teaching and what is not? *See, e.g., Malnak* v. *Yogi*, 440 F. Supp. 1284 (D. N.J. 1977) *aff'd curiam* 592 F.2d 197 (3rd Cir. 1979), a case involving a successful challenge to a public school elective course in the "Science of Creative Intelligence—Transcendental Meditation." Or will the University monitor the Jewish College Students or the Karate Club (see footnote 1 of the Court of Appeals opinion) to insure there is no religious content to their meetings? The record in the case at bar contains evidence that the Chief of Building and Grounds told one of the students that "the only way that we could be permitted to meet was if we presented all possible views of the Bible fairly, and not talk about just one view of

the Bible." 480 F. Supp. at 913. How was this exception carved out of the policy?

This Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), refused to permit state inspection and evaluation of parochial school expenditures. "Are state officials more competent to judge the religious nature of activities than they are to judge the religious nature of expenditures?" Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L. Rev. 313, 350 (1980). The State Regulation will generate a regime of official regulation of religion, administrative measures subject to legal clarification and adjudication by public officials. State officials should not be making such judgments concerning religion. It will lead inexorably to excessive entanglement.

CONCLUSION

If the petitioners had chosen to accommodate the religious interests of their students who, in a very real sense, make their homes on the campus, petitioners would have done nothing more than was done at the University of Virginia 200 years ago at the suggestion of Thomas Jefferson and James Madison. If the petitioners had chosen to accommodate the respondents' interests, they would not have done so with a religious purpose but only for the purpose of ensuring the students' constitutional rights, of developing their social, intellectual and cultural awareness, or of accommodating those who desire to express themselves religiously.

For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this,

despite the fact that Justice Clark, the author of the opinion in *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that required prayer in the public school violates the Establishment Clause."[10] Moreover, Justice Clark stated:

> Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind. Comment, *Constitutional Law—Religious Exercises and the Public Schools*, 20 Ark. L. Rev. 320, 325-26, n. 44 (1967).

In drafting their constitution, the people of the State of Missouri, echoing the beliefs of the Framers, proclaimed in their preamble: "We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe and grateful for His goodness, do establish this Constitution for the better government of the State". Never in their wildest imaginations did the drafters of this instrument conceive that one day their constitution could be argued in such a manner as to prohibit a group of students such as respondents from meeting on a university campus in that state.

Amicus curiae fervently argues that many fundamental constitutional rights are being violated under the misapplication of the Establishment Clause. Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L. J. 3, 27 et seq. (1978). The District Court, however, failed to take into account the value of the constitutional rights of these students for no

[10] Published official transcript of Justice Clark's address as the featured speaker of a symposium on "*Religion and the Public School*" at Wartburg College, Waverly, Iowa (Nov. 5, 1964) 46.

higher a reward than that an empty university room (not "classroom") be kept empty. As the United States Supreme Court has so eloquently stated:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

The decision of the District Court conflicts with the intentions of the Framers of the First Amendment as well as recent decisions rendered by the United States Supreme Court and lower federal courts. It is essential that the conflict be resolved promptly and in favor of the respondents, lest by unconstitutional restraint fundamental rights be strangled and, therefore, denied the respondents.

Respectfully submitted,

JOHN W. WHITEHEAD
JAMES J. KNICELY
J. ROBERT BRAME

Attorneys for Amicus Curiae
National Association of Evangelicals
450 E. Gunderson Drive
Wheaton, Illinois 60187

Dated: May 27, 1981